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Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence

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ESSAY

TINKERING AROUND THE EDGES: THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE

John D. Bessler*

INTRODUCTION

The U.S. Supreme Court has not squarely confronted the death penalty's constitutionality since the 1970s. In that decade, the Court actually ruled both ways on the issue. In *McGautha v. California*,[1] the Court first held in 1971 that a jury's imposition of the death penalty without governing standards did not violate the Fourteenth Amendment's Due Process Clause.[2] But then in 1972, in the landmark case of *Furman v. Georgia*,[3] the Court interpreted the Cruel and Unusual Punishments Clause to hold that death sentences—as then applied—were unconstitutional.[4] In that five-to-four decision, delivered in a *per curiam* opinion with all nine Justices issuing separate opinions,[5] U.S. death penalty laws were struck down as violations of the Eighth and Fourteenth Amendments.[6] The sentences of the "capriciously selected random handful" of those sentenced to die, one of the Justices wrote, are "cruel and unusual in the same way being struck by lightning is cruel and unusual."[7] Other Justices also emphasized the arbitrariness of death sentences,[8] with some focusing on the inequality and racial prejudice associated with them.[9]

Four years later, the Supreme Court reversed course yet again, approving once more the use of executions.[10] After thirty-five states reenacted death penalty laws

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1. 402 U.S. 183 (1971).
2. *Id.* at 196.
3. 408 U.S. 238 (1972).
4. *Id.* at 239–40.
5. David R. Dow, *The Last Execution: Rethinking the Fundamentals of Death Penalty Law*, 45 HOUS. L. REV. 963, 966 (2008).
6. *Furman*, 408 U.S. at 240.
7. *Id.* at 309–10 (Stewart, J., concurring).
8. *Id.* at 248 n.11, 251–53 (Douglas, J., concurring); *id.* at 291–95, 305 (Brennan, J., concurring).
9. *Id.* at 256–57 (Douglas, J., concurring); *id.* at 364–66 (Marshall, J., concurring).
10. Gregg v. Georgia, 428 U.S. 153 (1976).

in the wake of *Furman*,[11] the Supreme Court upheld the constitutionality of death penalty statutes in *Gregg v. Georgia*[12] and two companion cases.[13] The Court ruled that laws purporting to guide unbridled juror discretion—and requiring capital jurors to make special findings[14] or to weigh "aggravating" versus "mitigating" circumstances[15]—withstood constitutional scrutiny.[16] The Court in *Gregg* emphasized that the Model Penal Code itself set standards for juries to use in death penalty cases.[17] Only mandatory death sentences, the Court ruled that year, were too severe and thus unconstitutional.[18] In its decision in *Woodson v. North Carolina*,[19] the Court explicitly ruled mandatory death sentences, the norm in the Framers' era,[20] were no longer permissible and had been "rejected" by American society "as unduly harsh and unworkably rigid."[21]

This Essay examines America's death penalty forty years after *Furman* and provides a critique of the Supreme Court's existing Eighth Amendment case law. Part I briefly summarizes how the Court, to date, has approached death sentences, while Part II highlights the incongruous manner in which the Cruel and Unusual Punishments Clause has been read. For instance, Justice Antonin Scalia—one of the Court's most vocal proponents of "originalism"—has conceded that *corporal* punishments such as handbranding and public flogging[22] are no longer constitutionally permissible; yet, he (and the Court itself) continues to allow *death sentences* to be imposed.[23] The American Bar Association ("ABA") has yet to fully weigh in

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11. JOHN D. BESSLER, KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY 60 (2003).

12. *Gregg*, 428 U.S. at 153.

13. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

14. *Jurek*, 428 U.S. at 272.

15. *Gregg*, 428 U.S. at 164–66.

16. *See* José Felipé Anderson, *Punitive Damages vs. The Death Penalty: In Search of a Unified Approach to Jury Discretion and Due Process of Law*, 79 UMKC L. REV. 633, 640 n.25 (2011) (discussing state statutes enacted in the wake of *Gregg v. Georgia* and *Jurek v. Texas*).

17. Gregg v. Georgia, 428 U.S. 153, 193–95 (1976). Notably, the Model Penal Code's death penalty provisions, cited in *Gregg*, no longer exist. In October 2009, the American Law Institute ("ALI") withdrew the Model Penal Code's death penalty provisions "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 354 (2010).

18. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

19. *Woodson*, 428 U.S. at 280.

20. *Id.* at 289 ("At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.").

21. *Id.* at 293. By the early 1960s all death penalty jurisdictions had adopted discretionary sentencing schemes, replacing their automatic death penalty statutes with statutes designed to channel juror discretion. *Id.* at 291–92.

22. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 884 n.10 (2009) (noting that the Eighth Amendment has been found to prohibit "[t]he barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like'") (citing Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring)); *see also* Dolovich, *supra*, at 920 ("The deliberate infliction of corporal harm has long since been rejected in the United States as a form of legitimate punishment.").

23. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853–54, 862–63 (1989).

against the death penalty, though it has taken notice of the bevy of problems associated with it.[24] The ABA's two death penalty-related projects,[25] as well as the justice system's considerable experience with capital cases, plainly show that the reality of the death penalty's administration differs substantially from consideration of capital punishment in the abstract.[26]

Modern American society is very different from American life in the eighteenth century, yet executions, though increasingly rare, remain. This is so even though other harsh bodily punishments once used and tolerated in the penal system—among them, ear cropping and the pillory—have not been used for many decades.[27] Part III highlights the rarity of American executions in the 21st century

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24. The ABA does not take a position supporting or opposing capital punishment. But in 1997, the ABA called for a moratorium on executions until the death penalty can be "administered fairly and impartially, in accordance with due process." *ABA Endorses Moratorium on Imposition of Death Penalty*, 60 CRIM. L. REP. (BNA) 1434 (Feb. 12, 1997); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 45 n.7 (2001) ("The ABA House of Delegates voted for a moratorium until all jurisdictions conformed to previously adopted ABA policies aimed at ensuring fairness and impartiality in the administration of capital punishment."); *see also* American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) (discussing the 2003 newly adopted guidelines for the performance of defense counsel in capital cases). In August 2006, the ABA urged every jurisdiction that imposes capital punishment to implement policies and procedures to ensure that offenders with severe mental disorders or disabilities not be sentenced to death or executed. Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955, 2956 (2009).

25. The ABA's Death Penalty Representation Project, created in 1986, recruits volunteers to handle death penalty cases and works to ensure death row inmates receive effective legal representation. Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 720 n.98 (2002). The ABA's Death Penalty Moratorium Implementation Project, established in 2001, investigates death penalty systems in the U.S. and seeks to implement the ABA's call for a moratorium on executions. Celestine Richards McConville, *Yikes? Was I Wrong? A Second Look at the Viability of Monitoring Capital Post-Conviction Counsel*, 64 ME. L. REV. 485, 496 n.75 (2012).

26. *See* Editorial, *Public Should See Reality of Capital Punishment*, USA TODAY, May 17, 1994, at 10A ("In the abstract, the death penalty appeals to many as a tidy way of disposing of society's garbage. In the flesh, the death penalty is barbaric. A televised version of reality may make that case best of all."). America's death penalty system, as studies and judicial decisions have repeatedly shown, is riddled with error, racial discrimination, and incompetent counsel, all of which make the death penalty more reminiscent of a state-run lottery than a rational system of justice. *See, e.g.*, James S. Liebman et al., *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711 (2012); Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573 (discussing racial discrimination by capital jurors during death sentencing); Steven M. Pincus, *"It's Good to Be Free": An Essay about the Exoneration of Albert Burrell*, 28 WM. MITCHELL L. REV. 27 (2001); *see also* Erwin Chemerinsky, *Evolving Standards of Decency in 2003: Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201, 207 (2004) (noting that law professor and litigator Anthony Amsterdam has said the death penalty as administered is essentially a lottery: "[I]t's very much the luck of the draw in terms of the prosecutor, the judge, the jury").

27. *Ex parte* Wilson, 114 U.S. 417, 427 (1885) (noting that Congress abolished the pillory in 1839); Hadix v. Caruso, 461 F. Supp. 2d 574, 591–92 (W.D. Mich. 2006) (same); State v. Cannon, 190 A.2d 514, 517 (Del. 1963) (noting the abolition of branding and cropping of ears); W. J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 829 (1987) ("In 1829 the Tennessee General Assembly, in accordance with a national reform movement, abolished traditional methods for the punishment of crimes. Imprisonment replaced whipping, branding, and stocks."); Daniel E. Hall, *When*

along with the public's heightened unease with them, while Part IV summarizes the Framers' similar unease towards death sentences. Although corporal and capital punishments were meted out in eighteenth-century America, many Framers, history reveals, were fascinated by the potential of penitentiaries and the viability of alternatives to capital punishment. Many of America's founders, in fact, were heavily influenced by Cesare Beccaria's 1764 treatise, *On Crimes and Punishments*, which spoke out against torture and executions in favor of life sentences.[28] After Part V describes the continued and growing ambivalence of the American public toward executions—ambivalence shared by many U.S. jurists—this Essay concludes that the U.S. Supreme Court should declare the death penalty unconstitutional.

I. THE QUESTION OF THE CONSTITUTIONALITY OF EXECUTIONS

Since the 1970s, the Justices of the U.S. Supreme Court have skirted the issue of whether executions are unconstitutional *per se*.[29] Instead of focusing on whether executions are "cruel" and have become "unusual" as a factual and legal matter, the Justices have preferred to leave the issue of capital punishment largely to juries, legislative bodies, and executive branch officials.[30] Even when confronted with credible statistical proof showing a persistent pattern of racial bias in capital sentencing proceedings, the Court refused to strike down death sentences as unconstitutional.[31] In considering the Fourteenth Amendment's Equal Protection Clause, Justice Lewis Powell's majority opinion in *McCleskey v. Kemp* ruled that the Georgia inmate, Warren McCleskey, whose fate was at stake, had failed to

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Caning Meets the Eighth Amendment: Whipping Offenders in the United States, 4 WIDENER J. PUB. L. 403, 421 n.103 (1995) ("The Act of February 28, 1839, abolished whipping and standing in the stocks.") (citing Act of Feb. 28, 1839, ch. 36, § 5, 25 Stat. 321, 322 (1839)); Brian Hauck et al., *Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEGIS. 479, 481 n.16 (1999) ("In 1805, the Massachusetts legislature abolished whipping, branding, the stocks, and the pillory."). For a history of advocacy against corporal punishments, *see* MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA (1984) (discussing campaigns against corporal punishment in America during the late eighteenth and early nineteenth centuries).

28. ADOLPH CASO, WE, THE PEOPLE: FORMATIVE DOCUMENTS OF AMERICA'S DEMOCRACY 14 (1995); FRANCIS LIEBER, ED., ENCYCLOPAEDIA AMERICANA: A POPULAR DICTIONARY OF ARTS, SCIENCES, LITERATURE, HISTORY, POLITICS AND BIOGRAPHY 24–25 (1830). Instead of "life-without-parole sentences," Beccaria, Bentham, Blackstone, and America's founders themselves spoke in terms of "perpetual imprisonment," "permanent penal servitude," or "perpetual slavery." JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 36–37, 43, 49, 71, 86–87 (2012) [hereinafter BESSLER, CRUEL AND UNUSUAL].

29. Over the years, a number of Justices have expressed reservations about executions or particular death penalty laws. *See generally* MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL (1996) (discussing how only Justices William Brennan and Thurgood Marshall consistently viewed executions as *per se* violations of the Eighth and Fourteenth Amendments when they were on the bench).

30. Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 41–42 (2007); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305 (1983).

31. *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

show discrimination "in *his* case."[32] While forthrightly conceding that the statistical evidence presented[33] "indicate[d] a discrepancy that appears to correlate with race," Justice Powell rejected McCleskey's claim.[34] "Apparent disparities in sentencing," he wrote dismissively, in an opinion he would later wish he could take back, "are an inevitable part of our criminal justice system."[35]

The closest the U.S. Supreme Court has come to reassessing the death penalty's constitutionality as a whole came in 2008 in *Baze v. Rees*.[36] In that case, Kentucky death-row inmates challenged the state's three-drug lethal injection protocol, questioning the legality of the country's most prevalent method of execution.[37] In particular, the inmates argued that Kentucky's protocol carried a significant risk that severe pain might result during an execution if the protocol was not properly followed.[38] Although executions around the country were temporarily halted pending a ruling in *Baze*,[39] the Supreme Court flatly rejected the inmates' claims.[40] The Court made its ruling despite a Kentucky law barring *veterinarians* from using one of the lethal drugs, pancuronium bromide, to euthanize animals.[41] The inmates, Chief Justice John Roberts wrote, "have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment."[42] In a separate opinion, Justice John

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32. *Id.* at 292.

33. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

34. *McCleskey*, 481 U.S. at 312.

35. *Id.* Justice Powell, in his retirement, later expressed regret for his vote in *McCleskey*. James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 100 (2007).

36. 553 U.S. 35 (2008).

37. Every jurisdiction that uses the death penalty now authorizes lethal injection as a method of execution. *Id.* at 41.

38. *Id.* at 49; *see also id.* at 53 ("Their claim hinges on the improper administration of the first drug, sodium thiopental. It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.").

39. *See* Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in* Baze v. Rees: *A Fifth* Gregg *Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 828–29 (2010) (discussing the *Baze* ruling).

40. *Baze*, 553 U.S. at 47 ("Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure.").

41. *Id.* at 58; *id.* at 71 (Stevens, J., concurring); *see also* Robert Batey, *Reflections on the Needle: Poe,* Baze, *Dead Man Walking*, 44 VAL. U. L. REV. 37, 47 n.58 (2009) ("Like potassium chloride, pancuronium bromide is also widely prohibited from use in animal euthanasia.").

42. Baze v. Rees, 553 U.S. 35, 41 (2008). Since *Baze*, single drug lethal-injection protocols have been adopted in Arizona, Idaho, Ohio, and Washington. In addition, Texas and Georgia announced in July 2012 that they will use a single drug in lethal injections, and Missouri and South Dakota also now authorize lethal injections with one drug. Harvey Gee, *Eighth Amendment Challenges After* Baze v. Rees: *Lethal Injection, Civil Rights Lawsuits, and the Death Penalty*, 31 B.C. THIRD WORLD L.J. 217, 239 (2011); *PBS Newshour: Death Penalty: States Transition to One-Drug Executions* (PBS television broadcast July 19, 2012), *available at* http://www.pbs.org/newshour/

Paul Stevens lamented: "It is unseemly—to say the least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets."[43]

In spite of the Supreme Court's hostility toward claims challenging the constitutionality of executions as a general matter,[44] the Court has been willing to consider—and in some cases, reevaluate—the constitutionality of certain types of executions. Not only has the Court limited unbridled juror discretion[45] and invalidated individual death sentences in a variety of factual contexts,[46] but—utilizing its "evolving standards of decency" test—it has ruled that the U.S. Constitution forbids the execution of various categories of offenders.[47] Since the mid-1970s, the Court has read the Eighth and Fourteenth Amendments to prohibit the execution of the insane,[48] juvenile offenders,[49] the mentally re-

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rundown/2012/07/death-penalty-states-transition-to-one-drug-executions.html; Brandi Grissom, *Texas Will Change Its Lethal Injection Protocol*, TEX. TRIBUNE, July 10, 2012, *available at* http://www.texastribune.org/texas-dept-criminal-justice/death-penalty/texas-changing-its-lethal-injection-protocol/; *Arizona Inmate Executed with Single Drug*, BOSTON GLOBE (Mar. 1, 2012), http://articles.boston.com/2012-03-01/nation/31111201_1_execution-team-execution-protocol-three-drug-protocol; *State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state-lethal-injection (last visited July 9, 2012). In Kentucky, a state court judge ordered Kentucky officials to consider using a one-drug protocol "[i]n light of recent developments in the use of the one-drug protocol in other states." Trial Order, Baze v. Kentucky Dep't of Corr., No. 04-CI-1094, (Franklin Cir. Ct. Apr. 25, 2012). Kentucky made the switch to a single-drug protocol in July 2012. *One Drug Execution Protocol in Kentucky*, ABC36 News WTVQ, Lexington, KY *available at* http://www.wtvq.com/content/localnews/story/One-drug-execution-protocol-in-Kentucky/LLeXhL8Lj0Swty2cAWahww.cspx (last visited Nov. 14, 2012).

43. *Baze*, 553 U.S. at 71 (Stevens, J., concurring).

44. Gregg v. Georgia, 428 U.S. 153, 169 (1976) ("We now hold that the punishment of death does not invariably violate the Constitution."); *see also Baze*, 553 U.S. at 47 (2008) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.").

45. Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

46. *E.g.*, Brad Honigman, *Considering Cruelty:* State v. Chappell, State v. Snelling, *and the Cruelty Prong of the (F)(6) Aggravator*, 53 ARIZ. L. REV. 321, 326–27 (2011) ("The U.S. Supreme Court has declared aggravating factors unconstitutionally vague in several cases.") (citing Shell v. Mississippi, 498 U.S. 1 (1990) (*per curiam*); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980)); Scott W. Howe, *Race, Death and Disproportionality*, 37 N. KY. L. REV. 213, 237 n.172 (2010) (noting the Supreme Court "recently reversed two death sentences on *Batson* grounds") (citing Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005)); Bradley A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENN. L. REV. 661, 669 (2009) ("[I]n *Wiggins v. Smith* and *Rompilla v. Beard*, the Supreme Court set aside death sentences because of trial defense lawyers' failures to investigate and present mitigation evidence.") (citing Rompilla v. Beard, 545 U.S. 374, 393 (2005); Wiggins v. Smith, 539 U.S. 510, 537–38 (2003)).

47. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.1(b) (3d ed. 2011) ("In addition to regulating the procedures for death sentencing, the Court has narrowed the categories of offenders and offenses subject to capital punishment under the Eighth Amendment."); *see also* Joanna H. D'Avella, *Death Row for Child Rape? Cruel and Unusual Punishment Under the* Roper-Atkins *"Evolving Standards of Decency" Framework*, 92 CORNELL L. REV. 129, 138–39 (2006) (explaining the creation and application of the "evolving standards of decency" framework).

48. Ford v. Wainwright, 477 U.S. 399, 408–10 (1986); *see also* Panetti v. Quarterman, 551 U.S. 930 (2007).

49. Roper v. Simmons, 543 U.S. 551, 574 (2005); *see also* Thompson v. Oklahoma, 487 U.S. 815, 837–38 (1987) (holding it is unconstitutional to execute juvenile offenders under the age of sixteen).

tarded,[50] non-homicidal rapists,[51] and those who neither kill nor attempt or intend to kill.[52] With respect to juveniles and the mentally retarded, the Court even overturned its own precedents, issuing new rulings that have been given retroactive effect.[53] The Court previously allowed such offenders to be executed.[54] Even as it has restricted the death penalty's use, however, the Court has upheld the death penalty's constitutionality as a general matter[55] and allowed death sentences for those who kill or show a "reckless indifference to the value of human life."[56]

II. REEVALUATING EIGHTH AMENDMENT CASE LAW

Because it has been forty years since *Furman* ushered in the death penalty's modern era, it is appropriate now to stop and ask a few questions. First, given what is now known about executions themselves,[57] how "humane" is *any* execution or any *method* of execution?[58] After all, the punishment of death is expressly calculated to take life, and executions, however carried out, lead to the same result:

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50. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

51. Kennedy v. Louisiana, 554 U.S. 407, 413 (2008); Coker v. Georgia, 433 U.S. 584, 593–96 (1977).

52. Enmund v. Florida, 458 U.S. 782, 789–93 (1982).

53. Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51, 66 n.108 (2012) (citing *In re* Morris, 328 F.3d 739, 740 (5th Cir. 2003) (holding *Atkins* applies retroactively); Wimberly v. State, 934 So. 2d 411, 416 (Ala. Crim. App. 2005) ("The *Roper v. Simmons* decision also applies retroactively to cases on collateral review . . . .")); Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 93 (2011) ("[N]ew and retroactive capital eligibility rules, such as the *Atkins v. Virginia* bar on executing mentally retarded offenders, are frequently the bases for claims in successive petitions.").

54. *Roper* overruled *Stanford v. Kentucky*, 492 U.S. 361 (1989), and *Atkins* overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989).

55. Baze v. Rees, 553 U.S. 35, 47 (2008) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional."); *id.* at 63 (Alito, J., concurring) ("[W]e proceed on the assumption that the death penalty is constitutional."); *id.* at 87 (Stevens, J., concurring) ("This Court has held that the death penalty is constitutional.").

56. Tison v. Arizona, 481 U.S. 137 (1987). The Supreme Court has insisted that, in capital trials, defendants be allowed to introduce mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 608 (1978). The Court has also stated that punishments that involve "torture" or a "lingering death" violate the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 103 (1976); *In re* Kemmler, 136 U.S. 436, 447 (1890). In that category the Court has included burning at the stake, crucifixion, breaking on the wheel, and the like. *Kemmler*, 136 U.S. at 446.

57. One of the leading U.S. scholars on methods of executions is Deborah Denno, who has written extensively on that topic. *E.g.*, Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319 (1997); Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551 (1994); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49 (2007); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63 (2002). At a recent symposium on the topic, Professor Denno noted that *Baze* may not, in fact, be the last word on the constitutionality of lethal injection. "[T]here are limits to the Court's analysis," she wrote, "that suggest that it is by no means a definitive response to the issue of lethal injection's constitutionality." Deborah W. Denno, Symposium, *The Lethal Injection Debate: Law and Science: Introduction*, 35 FORDHAM URB. L.J. 701, 702 (2008). "*Baze* is so splintered," she pointed out, "that none of its seven opinions comprises more than three votes." *Id.*

58. *See* Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 815 (2008) ("[L]ethal injections are viewed by many as a process replete with error, state mismanagement, and as a potential violation of human rights.").

an inmate's death. Not only can botched executions result in *physical* pain,[59] but the *psychological* torture associated with death sentences[60] and prolonged[61] and isolated stays on death row[62] is arguably significantly greater than that associated with other Eighth Amendment violations.[63] Second, in terms of the U.S. Constitu-

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59. *See* Austin Sarat et al., *Gruesome Spectacles: The Cultural Reception of Botched Executions in America, 1890–1920*, 1 BRIT. J. AM. LEG. STUDIES 1 (2012) (detailing history of botched executions during late nineteenth and early twentieth centuries); Michael L. Radelet, *Some Examples of Post-*Furman *Botched Executions*, DEATH PENALTY INFORMATION CENTER (Oct. 1, 2010), http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions (last visited Nov. 12, 2012); *see also* Emily Pokora, *Should State Codes of Medical Ethics Prohibit Physician Participation in State-Ordered Executions?*, 37 W. ST. U. L. REV. 1, 13 (2009) ("Inadequate training and refusal of medical professional participation have led to a significant number of botched executions.").

60. *See Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) ("[M]ental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); *see also* Valle v. Florida, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay) (citing a study of Florida death-row inmates finding that 35% of inmates attempted suicide and documenting the harsh and debilitating conditions pervading death rows); Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1169 (2009) ("[T]here is no denying the mental anguish and terror that exists on death row.").

61. Thompson v. McNeil, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., statement respecting denial of cert.) ("Today, condemned inmates await execution for an average of nearly 13 years."); Lackey v. Texas, 514 U.S. 1045, 1046 n.* (1995) (Stevens, J., dissenting) (characterizing long stays on death row as "psychological torture"); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 192 (2005) ("*Lackey* claims are named for the death row inmate who argued that execution of an inmate after a 'lengthy' wait on death row violates the Eighth Amendment's ban on 'cruel and unusual punishments.'"); Ryan S. Hedges, *Justices Blind: How the Rehnquist Court's Refusal to Hear a Claim for Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577, 581 (2001) ("[I]nordinate delay of execution may be viewed as a form of psychological torture that would have been held cruel and unusual by the framers of the Bill of Rights."); Sherida Hibbard, *To Test, or Not to Test?: Problems with Post-Conviction Relief in Texas*, 13 TEX. TECH. ADMIN. L.J. 121, 124 (2011) ("The average time spent on death row in Texas is just over ten years."). Indeed, "[l]ife without possibility of parole has become the de facto punishment for a majority of the men and women under sentence of death, who will die in prison before they are executed." Semel, *supra* note 39, at 837; *see also id.* at 837 n.245 (noting that, in California since 1978, thirteen men have been executed while seventy-three death-row inmates "have died of natural or other causes").

62. *See* John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 966 (2005) ("In virtually every state, death row inmates are 'locked down' in their cells for most of the day, have little or no access to educational or other prison programs, and experience great isolation and loss of relationships."); Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 3 (2006) ("The devastating psychological and physical consequences of solitary confinement have been recognized since the mid-1880s."); Hannah Robertson Miller, *"A Meaningless Ritual": How the Lack of a Postconviction Competency Standard Deprives the Mentally Ill of Effective Habeas Review in Texas*, 87 TEX. L. REV. 267, 271 n.33 (2008) (noting that death row inmates are often confined to their cells for twenty-three hours per day); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 502 (2006) ("Solitary confinement can have serious psychological, psychiatric, and sometimes physiological effects on many prison inmates.").

63. Eighth Amendment violations—or cognizable Eighth Amendment claims—have often been based on psychological or emotional distress. Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (stating that allegation of strip search of male prisoner in front of female prison guards sufficed to state an Eighth Amendment claim if the search was "conducted in a harassing manner intended to humiliate and inflict psychological pain"; "physical injury need not result for the punishment to state a cause of action, for the wanton infliction of psychological pain

tion itself, must executions—at this time, especially in light of how rare executions have become[64]—be considered "cruel and unusual punishments"? These are questions the U.S. Supreme Court has not satisfactorily addressed to date, but that must be confronted head-on.

The Supreme Court's Eighth Amendment jurisprudence has already been aptly characterized as an "enigma"[65] and a "mess."[66] Such terms are fitting because, if for no other reason, *corporal* punishments are no longer used in America's penal system[67] while *capital* punishment remains. In other words, bodily punishments *less than death*—such as the historically familiar penal sanctions of whipping, the stocks, and ear cropping—are no longer tolerated in American law while the death penalty continues to be employed, albeit sporadically, by the U.S. legal system.[68] The disarray of Eighth Amendment case law has also been rightfully emphasized over the past few decades because Supreme Court cases are so often overruled,

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is also prohibited"); Jordan v. Gardner, 986 F.2d 1521, 1522–31 (9th Cir. 1993) (en banc) (stating that severe "psychological" pain and trauma can violate the Eighth Amendment); Northington v. Jackson, 973 F.2d 1518, 1522–25 (10th Cir. 1992) (stating that placing a revolver to a prisoner's head without justification and threatening to kill the inmate creates an actionable Eighth Amendment claim based on "psychological injury"); Chandler v. Baird, 926 F.2d 1057, 1066 (11th Cir. 1991) (finding inmate's statement that "I'm sure I was depressed from it" was sufficient, when coupled with allegations of harsh conditions of administrative confinement, to state a claim for violation of the Eighth Amendment standards for prison conditions); *see also* Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) ("It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment."); Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("Our more recent cases . . . have held that the [Eighth] Amendment proscribes more than physically barbarous punishments. The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . .'") (citations omitted); Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir. 1993) ("[I]n order to withstand summary judgment on an Eighth Amendment challenge to prison conditions a plaintiff must produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions."); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) (holding that, where complaint alleged that a guard pointed a lethal weapon at the prisoner, cocked it, and threatened him with instant death accompanied by racial epithets, "a prisoner retains at least the right to be free from the terror of instant and unexpected death at the whim of his allegedly bigoted custodians"); Madrid v. Gomez, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) ("[I]f the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.").

64. Since 1976, there have been 1314 executions in the United States. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (Nov. 9, 2012), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf. [hereinafter FACTS ABOUT THE DEATH PENALTY]. Of those, 1075 have been in just one region—the South—and 599 of them have been in just two states, Texas or Virginia. *Id.* at 3.Texas alone accounts for 490 of the executions that have taken place since the Supreme Court permitted the resumption of executions in 1976. *Id.*

65. JoLee Adamich et al., *The Selected Cases of Myron H. Bright: Thirty Years of His Jurisprudence*, 83 MINN. L. REV. 239, 254 (1998).

66. Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475 (2005).

67. The construction of prisons—as one commentator put it—"made possible the cessation of corporal punishment" and "now make[s] possible the cessation of capital punishment." Howard Bromberg, *Pope John Paul II, Vatican II, and Capital Punishment*, 6 AVE MARIA L. REV. 109, 145 (2007). In prior times, "[c]ommon non-lethal punishments included whipping, caning, branding, pilloring, ducking stools, public shaming, amputation, stockading . . . and exile." *Id.*

68. *See supra* note 27 and accompanying text.

often in the span of just a few years. Such sudden shifts by the Court, prompted by changes in membership, evolving public attitudes, or otherwise, make Eighth Amendment decision-making seem ad hoc at best.[69] The growing number of five-to-four Eighth Amendment rulings only highlights the contentious and controversial nature of such legal disputes.[70]

Even a cursory examination of the country's Eighth Amendment case law reveals its unprincipled character. For decades, the Eighth Amendment has been interpreted to *protect* prisoners from harm.[71] Applying the Cruel and Unusual Punishments Clause, the Court has barred prison officials from using excessive force[72] and subjecting inmates to inhumane conditions of confinement.[73] Courts have also read the Eighth Amendment to bar corporal punishments or bodily harm *short of death*.[74] In *Hope v. Pelzer*,[75] the Supreme Court characterized the

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69. In *Booth v. Maryland*, 482 U.S. 496 (1987), the Supreme Court held that the introduction of a victim impact statement ("VIS") at the sentencing phase of a capital trial violated the Eighth Amendment. *Booth* and another VIS case, *South Carolina v. Gathers*, 490 U.S. 805 (1989), were overruled in *Payne v. Tennessee*, 501 U.S. 808 (1991).

70. *E.g.*, Miller v. Alabama, 132 S. Ct. 2455 (2012) (five-to-four decision that the Eighth Amendment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders); Panetti v. Quarterman, 551 U.S. 930 (2007) (five-to-four decision finding an incompetency standard was too restrictive to protect a prisoner's Eighth Amendment rights); Roper v. Simmons, 543 U.S. 551 (2005) (five-to-four ruling holding that it is unconstitutional to execute offenders for crimes committed while under the age of eighteen), *overruling* Stanford v. Kentucky, 492 U.S. 361 (1989) (permitting the execution of sixteen- and seventeen-year-old offenders); Ewing v. California, 538 U.S. 11 (2003) (five-to-four decision holding that twenty-five-year prison sentence due to three strikes law did not violate the Eighth Amendment's prohibition against cruel and unusual punishment); Lockyer v. Andrade, 538 U.S. 63 (2003) (same); Sumner v. Shuman, 483 U.S. 66 (1987) (five-to-four ruling invalidating a Nevada law mandating a death sentence in all cases in which a prisoner is convicted of murder while serving a life-without-parole sentence); Woodson v. North Carolina, 428 U.S. 280 (1976) (five-to-four decision ruling that mandatory death penalty laws violated the Eighth Amendment); Roberts v. Louisiana, 428 U.S. 325 (1976) (same).

71. Farmer v. Brennan, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."). In a 1993 case, the Supreme Court further emphasized: "That the Eighth Amendment protects against *future* harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.'" Helling v. McKinney, 509 U.S. 25, 33 (1993) (emphasis added) (citation omitted); *see also id.* ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.").

72. *Farmer*, 511 U.S. at 832 ("[T]he Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners.") (citing Hudson v. McMillian, 503 U.S. 1 (1992)).

73. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."); *Farmer*, 511 U.S. at 832 ("The [Eighth] Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'") (citations omitted).

74. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (Blackmun, J.) ("[W]e have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment."); *see also* Furman v. Georgia, 408 U.S. 238, 283–84 (1972) (Brennan, J., concurring) ("[I]t does not advance analysis to insist that the Framers did not believe that adoption of the Bill of Rights would immediately prevent the infliction of the punishment of death; neither did

gratuitous handcuffing of a shirtless inmate to a hitching post for hours at a time, which resulted in an inmate's dehydration in the hot Alabama sun, as an "obvious" Eighth Amendment violation.[76] Yet, executions—the intentional taking of human life and a fate far worse—incongruously continue to be tolerated by the Supreme Court's case law.[77] The Court has never adequately explained how the Eighth Amendment can *protect* prisoners from harm and intolerable conditions yet simultaneously *permit* their execution. Nor could it, frankly.

The Supreme Court's decisions upholding the death penalty's constitutionality have made Eighth Amendment case law internally inconsistent and irreconcilable. Instead of focusing on the meaning of the terms "cruel" and "unusual" in the Eighth Amendment itself, the Court has applied its "evolving standards of decency" test,[78] assessing whether a "national consensus" exists[79] and attempting to gauge a "trend"[80] or the "consistency of the direction of change" in state laws.[81] Yet, as regards executions, the fundamental questions to be asked are whether it is "cruel" to intentionally inject an inmate with lethal chemicals[82] and whether executions—in a factual sense—have become too "unusual" to be allowed any longer. In *Kennedy v. Louisiana*,[83] the Supreme Court itself stated in a moment of candor that the "evolving standards of decency" principle "requires that use of the death penalty be restrained."[84] While the Court ruled there that "[i]n most cases

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they believe that it would immediately prevent the infliction of other corporal punishments that, although common at the time, are now acknowledged to be impermissible.") (citation omitted).

75. 536 U.S. 730 (2002).

76. *Id.* at 733–35, 737–38.

77. The Supreme Court has denied stays of execution even in situations where a member of the Court has asserted that it is cruel to execute inmates after they have spent more than three decades on death row. Valle v. Florida, 132 S. Ct. 1 (2011) (Breyer, J., dissenting from denial of stay) ("I have little doubt about the cruelty of so long a period of incarceration under sentence of death . . . . So long a confinement followed by execution would also seem unusual. The average period of time that an individual sentenced to death spends on death row is almost 15 years.").

78. Estelle v. Gamble, 429 U.S. 97, 102 (1976); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

79. Graham v. Florida, 130 S. Ct. 2011, 2022–23 (2010).

80. Kennedy v. Louisiana, 554 U.S. 407, 433 (2008).

81. Atkins v. Virginia, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *see also* Roper v. Simmons, 543 U.S. 551, 566 (2005) ("[W]e think the same consistency of direction of change has been demonstrated.").

82. Challenges to lethal injection protocols continue even as lethal-drug shortages have materialized because drug manufacturers are refusing to sell drugs to prison officials if those drugs might end up being used in executions. Erik Eckholm & Katie Zezima, *States Face Shortage of Key Lethal Injection Drug*, N.Y. TIMES (Jan. 22, 2011), http://www.nytimes.com/2011/01/22/us/22lethal.html; Ariane de Vogue, *Drug Shortage Disrupts Lethal-Injection Mix*, ABC NEWS (Mar. 16, 2011), http://abcnews.go.com/Politics/death-penalty-drug-shortage-disrupts-execution-lethal-injection/story?id=13148874#.T2efSXbU7ck. In Maryland, an administrative law decision actually halted that state's death penalty because of the failure to follow the requirements of the Administrative Procedure Act in attempting to adopt a lethal injection protocol. Arnold Rochvarg, *How Administrative Law Halted the Death Penalty in Maryland*, 37 U. BALT. L.F. 119, 120–23, 127–29 (2007).

83. 554 U.S. 407.

84. *Id.* at 446.

justice is not better served by terminating the life of the perpetrator,"[85] it did not establish a *per se* bar on executions.[86] Instead, it took the position that "resort" to the death penalty "must be reserved for the worst of crimes and limited in its instances of application."[87]

III. THE RARITY OF EXECUTIONS AND THE GROWING UNEASE WITH THEM

The death penalty is now meted out more on the basis of geography, race, and the poor quality of defense counsel[88] than on the nature of the crime.[89] State officials, due to the rarity of executions and their concerns about the way the death penalty is administered, are themselves increasingly reevaluating the need for death penalty laws in the first place.[90] In one of his last acts as Pennsylvania's chief executive, Governor Edward Rendell—a long-time death penalty supporter—wrote a letter to the state's General Assembly recounting that while he had signed 119 death warrants since taking office in January 2003, not one execution had taken place in the state in the prior eight years.[91] "[I]t seems to me," Rendell wrote, "that the time has come to re-examine the efficacy of the death penalty under these

85. *Id.* at 447.

86. The Court in *Kennedy* held as follows: "Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim." *Id.*

87. *Id.* at 446–47. Under international law, the worst of the worst crimes—genocide, crimes against humanity, and war crimes—are punishable by life imprisonment, not death, as the Rome Statute does not authorize the infliction of capital punishment. David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 997 (2008). In July 2012, United Nations Secretary-General Ban Ki-moon—like his predecessor—called on member states that still use the death penalty to abolish the practice. "The taking of life is too absolute, too irreversible, for one human being to inflict on another, even when backed by legal process," he said. *Secretary-General calls on States to abolish death penalty*, UN NEWS CENTRE (July 3, 2012), http://www.un.org/apps/news/story.asp?NewsID=42382&Cr=Human%20Rights&Cr1=; *see also Death Penalty Increasingly Viewed as Torture, UN Special Rapporteur Finds*, Office of the High Commissioner for Human Rights (Oct. 23, 2012), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12685&LangID=E ("States should consider whether using the death penalty per se fails to respect the inherent dignity of the person, causes severe mental and physical pain or suffering and amounts to torture or cruel, inhuman or degrading treatment, the United Nations Special Rapporteur on torture, Juan E. Méndez, has said.").

88. *See* Stephen B. Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

89. KENNETH WILLIAMS, MOST DESERVING OF DEATH?: AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE (2012); *see also* Eric Berger, *On Saving the Death Penalty: A Comment on Adam Gershowitz's Statewide Capital Punishment*, 64 VAND. L. REV. EN BANC 1 (2011) ("Since 2006, Texas has carried out nearly half of all executions nationwide."); *id.* at 2 ("[O]nly a few of Texas's 254 counties seek capital punishment with any regularity."); *id.* ("Other states, such as Pennsylvania and California, also have wide variations among counties' imposition of the death penalty, even among demographically similar counties.").

90. Connecticut, Illinois, New Mexico, and New Jersey recently abolished capital punishment. Valena Elizabeth Beety, *The Death Penalty: Ethics and Economics in Mississippi*, 81 MISS. L.J. 1437, 1457 (2012); Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 138 n.738 (2011–2012).

91. Letter from Gov. Edward G. Rendell to Members of the Pa. Gen. Assembly (Jan. 14, 2011), *available at* http://www.deathpenaltyinfo.org/outgoing-pennsylvania-governor-urges-state-legislators-review-death-penalty.

circumstances."[92] If "no avenue" could be found to "significantly shorten the time between offense and carrying out the sentence" without jeopardizing the "thorough and exhaustive" judicial review required, Rendell explained, he wanted legislators "to examine the merits of continuing to have the death penalty on the books—as opposed to the certainty of a life sentence without any chance of parole, pardon or commutation."[93]

Governor Rendell's sentiments are far from isolated. In California, which has the country's largest death row,[94] voters were asked in November 2012 to replace the state's largely dormant death penalty with life-without-parole sentences.[95] As a result of a ballot initiative that gathered nearly 800,000 signatures,[96] Californians had the chance to vote on whether to replace the death penalty with life-without-parole sentences and allocate the financial savings to be achieved from abolition to solving murder and rape cases.[97] In the lead up to that vote, California's death penalty had already ground to a halt while the state's governor, Jerry Brown, was embroiled in a legal skirmish over the state's lethal injection procedures.[98] As the *Huffington Post* reported in April 2012: "In the state's latest effort to restart long-stalled executions in California, Gov. Jerry Brown . . . ordered prison officials to explore using a single drug for lethal injections instead of three."[99]

While Proposition 34, the California initiative to repeal capital punishment, was

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92. *Id.*

93. *Id.* The U.S. Supreme Court has held that when "a capital defendant's future dangerousness is at issue" and "life imprisonment without possibility of parole" is available as a sentencing option, due process entitles the defendant to inform the jury of his or her parole ineligibility, either by a jury instruction or in arguments by counsel. Shafer v. South Carolina, 532 U.S. 36, 39 (2001); *accord* Kelly v. South Carolina, 534 U.S. 246 (2002); Simmons v. South Carolina, 512 U.S. 154 (1994).

94. As of April 1, 2012, California had 724 death row inmates. Since 1976, California has executed thirteen people. FACTS ABOUT THE DEATH PENALTY, *supra* note 64, at 2–3.

95. The SAFE California Campaign was supported by a coalition of law enforcement officials, murder victims' family members, and people who have been wrongfully convicted. *About the Coalition*, SAFE CALIFORNIA, http://www.safecalifornia.org/about/coalition (last visited Nov. 12, 2012).

96. Press Release, SAFE California to Replace Death Penalty Submits 800,000 Signatures to Qualify for November Ballot (Mar. 1, 2012), http://www.safecalifornia.org/downloads/Signatures-Filing-PR-SAFE-CA-Campaign.pdf.

97. The initiative sought to repeal the death penalty for persons found guilty of murder and replace death sentences with life imprisonment without possibility of parole. The initiative, which sought to create a $100 million fund to help law enforcement agencies solve more homicide and rape cases, would have applied retroactively to persons already sentenced to death and required persons found guilty of murder to work in prison and to pay victims restitution. Attorney General of California, *Initiative Statute 11-0035 for Death Penalty Repeal* (Oct. 21, 2011), http://www.safecalifornia.org/downloads/2.1.A_titleandsummary.pdf.

98. *California, 720 on Death Row, May Go Through 2012 with No Executions*, SAN JOSE MERCURY NEWS (Nov. 3, 2011), http://www.thecrimereport.org/archive/2011-11-ca-no-exec. In Oregon, Gov. John Kitzhaber also publicly announced in 2011 that he would not execute any of that state's death-row inmates for the remainder of his term. Editorial, *Oregon Gov. John Kitzhaber Leads with His Conscience*, L.A. TIMES (Nov. 25, 2011), http://articles.latimes.com/2011/nov/25/opinion/la-ed-death-20111125.

99. Paul Elias, *Jerry Brown on Lethal Injections: Governor Urges Officials to Make Changes*, HUFFINGTON POST (Apr. 26, 2012), http://www.huffingtonpost.com/2012/04/26/jerry-brown-on-lethal-injections_n_1457632.html.

narrowly defeated, recent national polls show that a majority of Americans prefer life-without-parole sentences to the death penalty.[100] California itself has not executed an inmate in more than six years, and the state's anti-death penalty initiative—known as the SAFE California Campaign—was led by Jeanne Woodford, a former San Quentin warden who once oversaw executions in the state. Woodford now favors life-without-parole sentences, as does Donald Heller, a former prosecutor who wrote and once championed California's death penalty law.[101] Although death penalty opponents were disappointed by the outcome of California's ballot initiative, the rarity of executions in the state—a key fact for the judicial evaluation of the unusualness of executions—demonstrates how unusual executions have become.

Like physicians and nurses,[102] lawyers and jurists have also begun more actively weighing in on America's death penalty. In Ohio, a justice of that state's supreme court, Paul Pfeifer, recently voiced opposition to the same death penalty law he helped draft as a young state senator.[103] "I have concluded that the death sentence makes no sense to me at this point when you can have life without the possibility of parole," he said in public comments.[104] Gerald Kogan, a retired chief justice of the Florida Supreme Court who once prosecuted capital cases, has also indicated recently that abolition should be considered,[105] while Justice Anthony Kennedy has himself recognized the anomaly of death sentences in relation to the Court's existing Eighth Amendment case law.[106] "When the law punishes by

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100. Howard Mintz, *Defeat of Proposition 34: California's Death Penalty Battle Will Continue*, SAN JOSE MERCURY NEWS (Nov. 7, 2012), http://www.mercurynews.com/crime-courts/ci_21951068/defeat-proposition-34-californias-death-penalty-battle-will ("[T]he 53-47 percent vote against Proposition 34 showed that California is moving toward abolition, given the fact more than 70 percent of the voters put the law on the books in 1978."). A poll conducted in 2010 by Lake Research Partners found that 61% of respondents would choose a punishment other than death for murderers. FACTS ABOUT THE DEATH PENALTY, *supra* note 64, at 4. The most popular alternative was "Life without parole plus restitution." *Id.*

101. Howard Mintz, *End death penalty measure likely to be on November ballot*, SAN JOSE MERCURY NEWS (Mar. 1, 2012), http://www.nodeathpenalty.org/news-and-updates/end-death-penalty-measure-likely-be-november-ballot. "It's been a colossal failure," Donald Heller said recently of the law he helped to put in place. Adam Nagourney, *Seeking an End to an Execution Law They Once Championed*, N.Y. TIMES, Apr. 6, 2012, at A1, *available at* http://www.nytimes.com/2012/04/07/us/fighting-to-repeal-california-execution-law-they-championed.html?_r=3&pagewanted=1&hpw.

102. The American Medical Association has taken the position that members of the medical profession should not participate in executions. Nadia N. Sawicki, *Doctors, Discipline, and the Death Penalty: Professional Implications of Safe Harbor Policies*, 27 YALE L. & POL'Y REV. 107, 121 (2008–2009). The American Nurses Association has also called upon state licensing and disciplinary boards to treat participation in executions as grounds for disciplinary action. *Id.* at 124.

103. Andrew Welsh-Huggins, *Ohio Justice Rejects Death Penalty Law He Wrote*, ASSOCIATED PRESS, Feb. 15, 2012, *available at* http://articles.boston.com/2012-02-16/nation/31063725_1_death-penalty-capital-punishment-law-death-sentences.

104. *Id.*

105. *Id.*

106. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."); Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("'The basic concept underlying the Eighth

death," Justice Kennedy wrote in 2008, "it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."[107]

The death penalty's history is one of successive restrictions on its use.[108] England's monarchical "Bloody Code" once authorized executions for more than 200 offenses,[109] but Great Britain—the country from which U.S. jurisdictions imported the "cruel and unusual punishments" language[110]—no longer allows capital punishment.[111] Indeed, all of Europe has followed suit in barring executions as a matter of law. In the European Union, it is now considered a flagrant violation of human rights to carry out an execution,[112] and Canada, European countries, and other nations have refused to extradite offenders to the United States until assurances are obtained that the death penalty will not be sought.[113]

Even places like Rwanda, South Africa, and Uzbekistan have done away with executions,[114] with South Africa's Constitutional Court issuing its decision declaring executions unconstitutional in 1995.[115] At a time when the world is turning its back on capital punishment, the incongruity of American executions is particularly pronounced, especially given that corporal punishments within American prisons are already a thing of the past.[116] The U.S. Supreme Court itself, ironically, has

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Amendment is nothing less than the dignity of man.'" (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion))).

107. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

108. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 3, 5–6, 8, 17–18 (2002). The death penalty—once administered in some of the most horrific ways imaginable—was previously used for all sorts of crimes. VICTOR STREIB, DEATH PENALTY IN A NUTSHELL 1–8 (3d ed. 2008).

109. RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 4 (3d ed. 2006).

110. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 94.

111. Kansas v. Marsh, 548 U.S. 163, 187 n.3 (2006) (Scalia, J., concurring) ("Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union."); *see also* William W. Berry III, *The European Prescription for Ending the Death Penalty*, 2011 WIS. L. REV. 1003, 1014; Roger Hood & Carolyn Hoyle, *Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic,"* 38 CRIME & JUST. 1, 5 (2009).

112. Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms established an absolute ban on the death penalty. No execution has taken place in a Council of Europe member state since 1997. Alice Izumo, *Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence*, 42 COLUM. HUM. RTS. L. REV. 233, 235–36 (2010).

113. Takuya Katsuta, Brown *and* Roper: *The American South and the Supreme Court*, 27 CONN. J. INT'L L. 119, 142 (2011).

114. Hood & Hoyle, *supra* note 111, at 1–2; Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 616 n.507 (2008); Megan M. Westberg, *Rwanda's Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR*, 59 U. KAN. L. REV. 331, 340 (2011).

115. *State v. Makwanyane and Another* 1995 (3) SA 391 (CC) at paras. 8, 10, 144–51 (S. Afr.).

116. WILLARD M. OLIVER & JAMES F. HILGENBERG, JR., A HISTORY OF CRIME AND CRIMINAL JUSTICE IN AMERICA 103, 300 (2d ed. 2010); JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 40–44 (9th ed. 2010). Corporal punishments were once regularly used in America's criminal justice system. *See generally* MARK COLVIN, PENITENTIARIES, REFORMATORIES, AND CHAIN GANGS: SOCIAL THEORY AND THE HISTORY OF PUNISHMENT IN NINETEENTH-CENTURY AMERICA 14, 29, 55, 135 (2000) (noting the use of corporal punishments); MARK E. KANN, PUNISHMENT, PRISONS AND PATRIARCHY: LIBERTY AND POWER IN THE EARLY AMERICAN REPUBLIC (2005) (discussing how certain Framers, such as Benjamin Rush, were ambivalent about corporal punishment).

frequently condemned brutal and inhumane treatment of offenders within U.S. prison facilities. For example, in 2011, in finding unconstitutional overcrowding within California's prisons that created unsanitary and unsafe conditions and that limited inmate access to medical care, the Court—relying on the Eighth Amendment—reaffirmed its long-standing commitment to protecting prisoners from harm.[117]

In early America, a whole host of crimes—from murder and rape to adultery and sodomy to witchcraft and idolatry—were death-eligible.[118] Now, however, the only circumstances in which American courts will even consider death penalty prosecutions are those involving acts of first-degree murder or crimes against the state, such as terrorism or espionage.[119] And such capital prosecutions are uncommon. The last execution for espionage was in 1953,[120] and capital charges today for first-degree murder are increasingly rare.[121] Death sentences and executions, the statistics show, are even rarer.[122] While the odds of a homicide offender being sentenced or put to death are increasingly small,[123] the chances of

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117. Brown v. Plata, 131 S. Ct. 1910, 1928–34 (2011); *see also* Jones v. Bock, 549 U.S. 199, 203 (2007) ("Our legal system . . . remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law.").

118. James Gerard Eftink, *Mental Retardation as a Bar to the Death Penalty: Who Bears the Burden of Proof?*, 75 MO. L. REV. 537, 546 (2010).

119. The Supreme Court has distinguished between crimes against individuals and crimes against the State and reserved judgment as to how the Court might rule as to the constitutionality of the death penalty regarding the latter. Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) ("We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken.").

120. Sarah Frances Cable, *An Unanswered Question in* Kennedy v. Louisiana: *How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?*, 70 LA. L. REV. 995, 1017–18 (2010) (noting that "the last execution for espionage was the Rosenbergs in 1953" and that "no one has been put to death for treason since John Brown in 1859").

121. Eileen M. Connor, *The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States*, 100 J. CRIM. L. & CRIMINOLOGY 149, 151 (2010) ("[T]he number of federal capital prosecutions remains low, and the vast majority of homicide prosecutions are undertaken by state criminal justice systems."); Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 416 (2010) (noting that the U.S. witnesses "between 15,000 and 20,000 homicides per year" but that in 2007 "[f]ewer than 50 people were executed and slightly over 100 people were sentenced to death nationwide").

122. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 237 (2012) ("[J]ust 10% of counties in the United States account for all death sentences imposed from 2004 to 2009."); *id.* ("[S]ince 1976, only 15% of the counties in the United States have sentenced anyone to death who subsequently has been executed. Only fifty counties (1.6%) have sentenced five or more people to death whom their respective state ultimately executed.") (footnote omitted).

123. For example, the Centers for Disease Control and Prevention reported that, for 2007, there were 18,361 homicides in the United States. Joseph E. Logan et al., *Homicides—United States, 1999–2007*, *in* 60 MORBIDITY AND MORTALITY WEEKLY REPORT: CDC HEALTH DISPARITIES AND INEQUALITIES REPORT—UNITED STATES, 2011, at 67–68 (Ctrs. for Disease Control and Prevention ed., Supp. 2011), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/su6001a14.htm. By comparison, the U.S. had forty-two executions in 2007, showing that the odds of a death-eligible offender actually being executed are extremely small. FACTS ABOUT THE DEATH PENALTY, *supra* note 64, at 1.

receiving a death sentence increase dramatically depending on the defendant's race[124] or the victim's race.[125] At the same time, a recent report by the National Research Council of the National Academies has called into question the social science research purporting to find that executions have a measurable deterrent effect on reducing homicides.[126]

Racial prejudice, meanwhile, continues to play a significant role in deciding who lives and who dies, as it long has in the United States. In the Framers' era, slaves were frequently executed to suppress or quell slave rebellions, and slave codes regularly made certain crimes death-eligible for blacks but not for whites.[127] Of the 4,743 people lynched in the U.S. from 1882 to 1968, 3,446, or more than 72 percent, were black.[128] Of the 3,334 persons executed for murder between 1930 and 1968, almost half, 1,630, were black, with the vast majority of those executions—1,231—taking place in the South.[129] Indeed, the lynching of African Americans, as well as the disparity of treatment between whites and blacks in the

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124. Jules Epstein, *Death-Worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 TEMP. POL. & CIV. RTS. L. REV. 389, 408 (2010) ("A study of 339 death verdict cases in Philadelphia, Pennsylvania, with verdicts recorded between 1978 and 2000, showed 'the odds of receiving a death sentence at the weighing stage of the penalty trial were, on average, 3.8 times higher for black defendants than for similarly situated non-black defendants.'") (quoting David C. Baldus et al., *Race and Proportionality Since* McCleskey v. Kemp *(1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 155 n.59 (2007)).

125. David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1300 (2011) ("The data document white-victim and minority-accused/white-victim disparities in the imposition of death sentences among all death-eligible cases that are consistent with findings in numerous state systems on which comparable data are available."); Danielle Ward Mason, *Racism on Our Juries: The Impossibility of Impartiality in Capital Cases*, 12 JONES L. REV. 169, 184–85 (2008) ("'[I]n Florida, a defendant's odds of receiving a death sentence are 4.8 times higher if the victim was white than if the victim is black in similarly aggravated cases. In Illinois, the multiplier is 4, in Oklahoma it is 4.3, in North Carolina 4.4, and in Mississippi it is 5.5.'") (quoting Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/death-penalty-black-and-white-who-lives-who-dies-who-decides (last visited Nov. 12, 2012)); Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647, 659 (2011) ("The relationship between the victim's race and death sentencing . . . is very strong, and it is statistically significant."); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2144–45 (2011) (concluding that the odds of a death sentence for a suspect who kills a white person are three times higher than the odds for a suspect who kills a black person).

126. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., DETERRENCE AND THE DEATH PENALTY 2 (2012). A press release that accompanied the release of the report emphasized:

> The key question, the report says, is whether capital punishment is less or more effective as a deterrent than alternative punishments, such as a life sentence without the possibility of parole. Yet none of the research that has been done accounted for the possible effect of noncapital punishments on homicide rates.

Press Release, Current Research Not Sufficient to Assess Deterrent Effect of the Death Penalty (Apr. 18, 2012), *available at* http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=13363.

127. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 2, 151–53, 188–89, 216–19, 307.

128. JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA 232 n.6 (2003).

129. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 3.

criminal justice system, is what prompted some of the NAACP's earliest law-reform activities.[130] The historical evidence of racial discrimination in the death penalty's infliction is not only strong, it is overwhelming. Of the 443 convicted rapists executed in the South from 1930 to 1968, the vastly predominant number, 398, were black.[131]

The situation today is little changed, though the racial discrimination is much more covert. Prospective black jurors are often struck in a racially discriminatory manner,[132] and race-of-the-victim discrimination—with black-on-white homicides punished the most severely—is well documented.[133] For example, in *Miller-El v. Dretke*,[134] the Supreme Court emphasized that out of twenty black members of the 108-person venire, only one sat in judgment in the case, with the prosecutor striking 91 percent of the eligible African-American venire members using peremptory challenges.[135] In a recent case in North Carolina, Superior Court Judge Gregory Weeks vacated a sentence of death under the state's Racial Justice Act[136] after finding a death row inmate's sentence was the product of racial bias.[137] In accordance with the Act, the inmate, Marcus Robinson, was then resentenced to life imprisonment without the possibility of parole.[138]

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130. *See* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950, at 18–20, 23, 210 (1980) (discussing how the NAACP was formed in response to the failure of law enforcement officials to protect black communities from lynch mobs).

131. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 3.

132. Snyder v. Louisiana, 552 U.S. 472, 477–85 (2008); Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005).

133. FACTS ABOUT THE DEATH PENALTY, *supra* note 64, at 2 (noting that eighteen people have been executed for interracial murders where the defendant was white and the victim was black, but that 255 people have been executed where the defendant was black and the victim was white).

134. *Miller-El*, 545 U.S. 231.

135. Id. at 240–41.

136. N.C. GEN. STAT. §§ 15A-2010 to -2012 (2011).

137. The North Carolina Superior Court Judge found that race was "a significant factor in decisions by prosecutors to exercise peremptory strikes"; that "[p]rosecutors intentionally used the race of venire members as a significant factor in decisions to exercise peremptory strikes"; and that the inmate's judgment "was sought or obtained on the basis of race." Order Granting Motion for Appropriate Relief at 163–67, State v. Robinson, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012), *available at* http://www.aclu.org/files/assets/marcus_robinson_order.pdf.

138. *Id.* at 167. As a result of that case, North Carolina lawmakers passed legislation to effectively repeal North Carolina's Racial Justice Act, then voted to override Gov. Bev Perdue's veto of the legislation they passed. The passage of the repeal legislation means that death row inmates in North Carolina are no longer allowed to use statewide statistics to demonstrate racial bias in the state's capital punishment system. In response to the change in North Carolina's law, Sarah Preston—the Policy Director for the American Civil Liberties Union of North Carolina—issued the following statement:

> This is a sad day for justice and for North Carolina. By gutting the Racial Justice Act, our legislature has turned its back on the overwhelming evidence of racial bias in our state's death penalty system. Politicians have decided they would rather sweep disturbing information under the rug than work to ensure that racial bias plays no role in North Carolina's death penalty.

Press Release, ACLU-NC Condemns Veto Override of Racial Justice Act Repeal Bill (July 2, 2012), http://www.aclu.org/racial-justice/aclu-nc-condemns-veto-override-racial-justice-act-repeal-bill.

The U.S. Supreme Court has long railed against arbitrary punishments,[139] much like America's founders did in their time.[140] In *Philip Morris USA v. Williams*,[141] a 2007 case adjudicating the legality of an award of punitive damages, the Supreme Court noted, for example, that its prior case law "emphasized the need to avoid an arbitrary determination of an award's amount."[142] The Court expressed special concern about "arbitrary punishments," what it described as "punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'"[143] While the U.S. Constitution and its Bill of Rights are *national* in scope, protecting American citizens regardless of race or geography, the death penalty is now largely a *regional* or *local* phenomenon, used in just a handful of geographic locations, mostly in the South.[144] The happenstance of where a crime occurs, as opposed to the nature of the crime itself, is thus often the determining factor in whether a particular criminal is executed.

There is a stark difference between jurisdictions in the Deep South and elsewhere regarding death sentences and executions, as well as a documented disparity between urban and rural areas.[145] Although individual states have traditionally regulated criminal law,[146] the sheer arbitrariness of executions—

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139. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); Furman v. Georgia, 408 U.S. 238, 277 (1972) (Brennan, J., concurring) ("[T]he very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments.") (citation omitted).

140. United States v. Booker, 543 U.S. 220, 238–39 (2005) ("The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases.") (quoting THE FEDERALIST NO. 83 (Alexander Hamilton)); BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 310 (explaining that Edmund Pendleton said the "Judiciary" was "necessary" to "prevent arbitrary punishments"); *see also* Stan L. Basler, *Restorative Justice as a Third School of Criminology*, 33 OKLA. CITY U. L. REV. 213, 214 (2008) ("The late eighteenth-century founders of the classical school were Jeremy Bentham (England) and Cesare Beccaria (Italy). They were motivated by concerns about the employment of severe and arbitrary punishments by nation-states.").

141. 549 U.S. 346 (2007).

142. *Id.* at 352.

143. *Id.* (quoting State Farm Mut. Auto. Ins. Co.v. Campbell, 538 U.S. 408, 416, 418 (2003)).

144. Katsuta, *supra* note 113, at 155 ("[M]ost of the executions after 1976 were carried out in the South."); *see also Racial and Geographic Disparities in the Federal Death Penalty System: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary*, 107th Cong. (2001). *See generally* Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305 (2009) (discussing the geographic and racial disparities in Missouri executions).

145. Glenn L. Pierce & Michael L. Radelet, *Monitoring Death Sentencing Decisions: The Challenges and Barriers to Equity*, 34 HUMAN RIGHTS 2, 3 (2007) ("[O]ne study of different areas in Illinois found that the odds of a defendant's receiving a death sentence in highly populous Cook County were, on average, 83.6 percent lower than those for killing a victim in a similar homicide in rural areas of the state.").

146. Ryan M. Goldstein, *Improving Forensic Science Through State Oversight*, 90 TEX. L. REV. 225, 232 (2011) ("In the American system of federalism, criminal law is traditionally reserved to the states under the police or welfare power.").

despite unsupported findings to the contrary[147]—have led some U.S. Supreme Court Justices to find executions unconstitutional in light of the Constitution's due process and equal protection guarantees,[148] the latter added in 1868 in the Fourteenth Amendment.[149] The U.S. Supreme Court has already interpreted the Fourteenth Amendment to prohibit the "arbitrary deprivation of life,"[150] emphasiz-

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147. *See, e.g.*, People v. Booker, 245 P.3d 366, 409 (Cal. 2011) ("The circumstances and pace of California's executions do not make the death penalty arbitrary or unconstitutional.").

148. James R. P. Ogloff & Sonia R. Chopra, *Stuck in the Dark Ages: Supreme Court Decision Making and Legal Developments*, 10 PSYCHOL. PUB. POL'Y & L. 379, 397 (2004) ("In Justice Blackmun's view, the Baldus data provided enough evidence to show that the Georgia capital punishment system violates the equal protection clause of the Fourteenth Amendment."); Malcolm E. Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment after* Furman v. Georgia, 25 STAN. L. REV. 62, 81 (1972) (discussing *Furman* and noting with respect to that decision that "some of the Justices seem to consider a small number of annual executions prima facie evidence of arbitrariness"); *see also* Callins v. Collins, 510 U.S. 1141, 1143–44 (1994) (Blackmun, J., dissenting) ("Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all . . . and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."); *id.* at 1153 ("It seems that the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution."); McCleskey v. Kemp, 481 U.S. 279–339 (1987) (Brennan, J., dissenting) ("The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law."); *id.* at 346 (Blackmun, J., dissenting) ("[T]he legislative history of the Fourteenth Amendment reminds us that discriminatory enforcement of States' criminal laws was a matter of great concern for the drafters."); Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring) (stating that death penalty laws were "pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments").

149. U.S. CONST. amend. XIV. The ratification of the Fourteenth Amendment, which fundamentally altered the relationship between the states and the federal government, undercuts Justice Scalia's "originalist" philosophy and his late-eighteenth-century-centric view of the Eighth Amendment. Because the Fourteenth Amendment was ratified in 1868, long after the Framers had all died, a reading of the U.S. Constitution must take into account the Fourteenth Amendment's due process and equal protection guarantees. A constitution, as Chief Justice John Marshall wrote, "is designed to approach immortality as nearly as human institutions can approach it" and "is framed for ages to come," with exposures to "storms and tempests" to be expected. Cohens v. State of Virginia, 19 U.S. 264, 387 (1821) (Marshall, C.J.). The provisions of the U.S. Constitution, many of which were written in general terms for future judges to construe, and which now include the Equal Protection Clause among them, must be harmonized, just as *living* judges must independently interpret the Constitution's text to the best of their abilities. Id. at 387–88, 391, 393, 398, 404, 414 (emphasizing that different provisions of the Constitution are "equally obligatory, and are to be equally respected"; that the Constitution is to be construed "to give effect to both provisions, as far as it is possible to reconcile them"; that the Court must "exercise our best judgment, and conscientiously . . . perform our duty"; and that unconstitutional laws are "absolutely void"). Indeed, if the Cruel and Unusual Punishments Clause were interpreted today as those in the pre-Fourteenth Amendment era read it, African Americans would be entirely excluded from its protections. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 188–89 (noting that an 1824 decision of the Virginia Supreme Court found that the state's prohibition against "cruel and unusual punishments" was "never . . . contemplated, or considered, to extend to the whole population of the State," with the Virginia court noting: "Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended by it?"). Obviously, the Fourteenth Amendment—with its "equal protection" guarantee—now ensures that all Americans, regardless of race or color, are protected from "cruel and unusual punishments."

150. South Carolina *ex rel.* Phoenix Mut. Life Ins. Co. v. McMaster, 237 U.S. 63, 72 (1915); Hodgson v. Vermont, 168 U.S. 262, 273 (1897); Jones v. Brim, 165 U.S. 180, 182 (1897); Giozza v. Tiernan, 148 U.S. 657,

ing that "in the administration of criminal justice," the Fourteenth Amendment "requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses."[151]

The touchstone of due process is the protection of individuals against "arbitrary" government action,[152] and the Supreme Court's equal protection jurisprudence has likewise concerned itself with "arbitrary" government classifications that affect some citizens differently than others.[153] America's 200-plus years of discrimination and error-laden experience with capital punishment amply demonstrates that executions—carried out in a mostly random, haphazard fashion throughout the nation's history[154]—run afoul of both due process and equal protection principles.[155]

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662 (1893); Yesler v. Bd. of Harbor Line Comm'rs, 146 U.S. 646, 655 (1892); *Ex parte* Converse, 137 U.S. 624, 631–32 (1891); Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 238 (1890); *In re* Kemmler, 136 U.S. 436, 448–49 (1890); Mugler v. Kansas, 123 U.S. 623, 663 (1887); Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886); Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 519 (1885); Barbier v. Connolly, 113 U.S. 27, 31 (1884); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707 (1884); *accord* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 586 (1996) (Breyer, J., concurring).

151. *Converse*, 137 U.S. at 632; *Kemmler*, 136 U.S. at 449; *see also Barbier*, 113 U.S. at 31 ("[N]o different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.").

152. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005); Rogers v. Tennessee, 532 U.S. 451, 467 (2001); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998); Foucha v. Louisiana, 504 U.S. 71, 80 (1992); Chapman v. United States, 500 U.S. 453, 465 (1991); Ponte v. Real, 471 U.S. 491, 495 (1985); Goss v. Lopez, 419 U.S. 565, 574 (1975); Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Dent v. West Virginia, 129 U.S. 114, 123 (1889); *see also* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 834 (1994) ("[C]riminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of . . . power.").

153. *See* Engquist v. Oregon Dept. of Agric., 553 U.S. 591, 602 (2008); Clements v. Fashing, 457 U.S. 957, 967 (1982); Sioux City Bridge Co. v. Dakota Cnty., Neb., 260 U.S. 441, 445 (1923); *see also* Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review."); W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 660 (1981) ("[T]he Fourteenth Amendment, ratified in 1868, introduced the constitutional requirement of equal protection, prohibiting the States from acting arbitrarily or treating similarly situated persons differently . . . .").

154. Jurists themselves have long expressed concern over arbitrary executions. E.g., People v. Gleckler, 411 N.E.2d 849, 856 (Ill. 1980) ("The State must avoid arbitrary executions by adequately defining capital offenses, by suitably directing sentencing discretion, and by ensuring adequate judicial review of cases in which the death sentence is imposed."). On the international level, the United Nations has a Special Rapporteur whose duty is to issue reports concerning "extrajudicial, summary and arbitrary executions." Hinojosa v. Texas, 4 S.W.3d 240, 252 n.20 (Tex. Crim. App. 1999). The current Special Rapporteur is Christof Heyns, a South African law professor and human rights activist who has called the death penalty "systemic and organized violence by the state." Corydon Ireland, *Death Penalty in Decline*, HARV. GAZETTE, June 27, 2012, *available at* http://news.harvard.edu/gazette/story/2012/06/death-penalty-in-decline/.

155. *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.") (citation omitted); Bush v. Gore, 531 U.S. 98, 104 (2000) ("Equal protection applies as well to the manner of its exercise."). *See generally* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker et al. eds., 2d ed. 2003); BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 310. *But see* McGowan v. Maryland, 366 U.S. 420, 427 (1961) ("[W]e

IV. THE AMBIVALENCE TOWARD EXECUTIONS IN THE FOUNDING ERA

The sordid history of America's death penalty—which many of the Founders themselves sought to curtail[156]—shows Americans' now centuries-old ambivalence toward executions.[157] In the same era in which John Hancock called for an end to the punishments of "cropping and branding, as well as that of the Public Whipping Post,"[158] America's founders questioned the death penalty's use—if not for every crime, then at least for many offenses.[159] In eighteenth-century Virginia, Thomas Jefferson and James Madison sought to restrict executions to cases of murder and treason,[160] a proposal that, in 1785, lost by just a single vote.[161] Madison's college classmate and close friend William Bradford—the second Attorney General of the United States—authored an essay in 1793 titled "An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania."[162] In that essay, written shortly after the ratification of the U.S. Bill of Rights, Bradford advocated for the death penalty's abolition for all crimes except murder. And as for murder, Bradford was perfectly willing to entertain the possibility that evidence might later show that the death penalty for that crime was not an appropriate punishment either.[163]

To be sure, the Framers' views were diverse and often changed with the times. While some founders, like John Adams and John Jay, had fewer moral qualms with

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have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite.").

156. Many early American legislators were inspired to reform death penalty laws by Cesare Beccaria's treatise, *On Crimes and Punishments*. In a 1786 letter written in Philadelphia by James Madison's friend, William Bradford, Jr., to Luigi Castiglioni, an Italian botanist who visited America in the 1780s, Bradford wrote this of Beccaria's treatise: "One must attribute mainly to this excellent book the honor of this revolution in our penal code. The name of Beccaria has become familiar in Pennsylvania, his authority has become great, and his principles have spread among all classes of persons and impressed themselves deeply in the hearts of our citizens." LUIGI CASTIGLIONI'S VIAGGIO: TRAVELS IN THE UNITED STATES OF NORTH AMERICA, 1785–87, 313–14 (Antonio Pace ed. & trans. 1983). By the time French writer Alexis de Tocqueville toured America in the 1830s, he observed that "the Americans have almost expunged capital punishment from their codes." Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 STAN. L. REV. 1641, 1651 (2004) (book review). Tocqueville arrived in America in 1831 and published his acclaimed book, *Democracy in America*, in 1835. MICHAEL DROLET, TOCQUEVILLE, DEMOCRACY AND SOCIAL REFORM 9, 20 (2003).

157. The Framers' attempts to curtail executions in American society are detailed in my recent book on the subject. *See generally* BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 50–55, 57–161.

158. *Id.*

159. *Id.* at 66–161.

160. *See id.* at 141–45. In a letter to Jefferson penned in 1776, Edmund Pendleton wrote: "Our Criminal System of Law has hitherto been too Sanguinary, punishing too many crimes with death, I confess." *Id.* at 141.

161. *Id.* at 145, 156–57.

162. *Id.* at 85.

163. *Id.* at 85–91. For anyone who thought a prison sentence too lenient, Bradford suggested that his readers look "into the narrow cells prepared for the more atrocious offenders" and consider the "hard labor" they would perform and the "coarse fare" they would subsist on during their incarceration. He also encouraged readers to consider that offenders would "languish in the solitude of a prison"—"cut off" from family—as they lived out their "tedious days" and their long nights of "feverish anxiety." BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 90.

executions, they still struggled with their use in some circumstances.[164] Others were even more circumspect.[165] James Wilson, a signer of both the Declaration of Independence and the U.S. Constitution, regularly referred to Cesare Beccaria's abolitionist writings[166] and noted with pride: "How few are the crimes—how few are the capital crimes, known to the laws of the United States, compared with those known to the laws of England!"[167] Wilson also said that "cruelty" is the "parent of *slavery*" and called "cruel" punishments "dastardly and contemptible."[168] Benjamin Franklin—America's senior statesman—himself pondered in 1785: "To put a man to death for an offence which does not deserve death, is it not murder?"[169] And even military leaders, such as George Washington and Alexander Hamilton, came to believe that executions were far too frequent.[170]

As state penitentiaries were built following the adoption of the U.S. Constitution and the ratification of the Bill of Rights,[171] America's founders seemed to have even less of an appetite for executions.[172] Writing in the 1820s, Madison spoke of his attraction to "penitentiary discipline" as a substitute for "the cruel inflictions so disgraceful to penal codes."[173] In 1823, Madison even wrote one Kentucky correspondent, G. F. H. Crockett, "I should not regret a fair and full trial of the entire abolition of capital punishments by any State willing to make it: tho' I do not see the injustice of such punishments in one case at least."[174] Inspired by Beccaria's popular 1764 essay, *On Crimes and Punishments*,[175] Jefferson, too, emphasized in 1821 that Beccaria and others "had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death."[176] Dr. Benjamin Rush—a signer of the Declaration of Independence—specifically called death "an improper punishment for *any* crime" and advocated for the death

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164. *See id.* at 56. John Jay expressed his views as follows: "As to murderers, I think it not only lawful for government, but that it is the duty of government, to put them to death." *Id.* While President John Adams approved of some executions, he disapproved others and personally owned a copy of Beccaria's book, *On Crimes and Punishments*. *Id.* at 50, 56.

165. Many efforts were made in the founding era to curtail the use of executions for various crimes. *See id.* at 62, 76, 78–79, 86–89, 139–46, 156–67, 193, 257, 272, 274.

166. *Id.* at 51.

167. *Id.* at 52.

168. *Id.* at 52–53.

169. *Id.* at 123.

170. *See id.* at 126–38. In a letter to her husband John in 1797, Abigail Adams pondered what might happen "if the states go on to abolish capital punishment." *Id.* at 62. John and Abigail's son, John Quincy Adams, who studied the death penalty as a young man and who became the sixth President of the United States, would go on to support efforts to abolish capital punishment. *Id.* at 63–64, 273–74.

171. *Id.* at 269–70.

172. *See id.* at 85–91, 150, 296.

173. *Id.* at 296.

174. *Id.* at 158.

175. *See* John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL'Y 195, 196 (2009).

176. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 145.

penalty's total abolition.[177] Thomas Paine—the author of *Common Sense* and often called the "Father of the American Revolution"—also opposed executions, calling them "barbarous" and "cruel spectacles."[178] While executions in the founding era could not be fairly described as "unusual,"[179] much evidence exists that, in the late eighteenth and early nineteenth centuries, many Americans already viewed executions as "cruel" in the ordinary parlance of the day.[180]

V. THE PUBLIC'S AND JURISTS' AMBIVALENCE TOWARD EXECUTIONS

Americans have always been—and still remain—highly ambivalent about executions. Decades ago, executions came to be seen by American civic leaders as brutalizing spectacles and were relegated to the confines of prisons.[181] Sometimes, state laws even went so far as to bar reporters from attending or reporting the details of executions.[182] The abandonment of mandatory death sentences in favor of discretionary ones was due, in part, to jurors' antipathy toward executions themselves.[183] After Tennessee gave juries discretion over whether to impose a death sentence for murder in 1838, other states followed suit, and by 1963 all states had done away with mandatory death sentences.[184] Today, the number of death sentences and executions is down nationwide, including in Texas.[185] A recent report of the Death Penalty Information Center titled *A Crisis of Confidence: Americans' Doubts About the Death Penalty*, concluded: "People are deeply concerned about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic

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177. *Id.* at 70; *see also id.* at 66–84 (detailing Dr. Benjamin Rush's advocacy).

178. *Id.* at 108.

179. In early America, executions were, after all, the *mandatory*—and thus the *usual* or *standard*—punishment for certain crimes. *See* Andres v. United States, 333 U.S. 740, 747 (1948) (noting that a 1790 act of the First Congress provided in part that, upon conviction, those committing murder "shall suffer death").

180. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 52–53, 61, 86, 108–9, 122, 125, 130, 135–36, 146, 159–60, 181, 183–84, 296 (discussing the American founders' use of the term "cruel"). In the debate in the First Congress over the "cruel and unusual punishments" language, one opponent of the proposed language, after discussing the punishments of hanging, whipping, and ear cropping, even explicitly mused about whether, in the future, they might be "prevented from inflicting these punishments because they are cruel?" *Id.* at 186.

181. *See generally* JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 40–80 (1997) [hereinafter BESSLER, DEATH IN THE DARK].

182. John D. Bessler, *The "Midnight Assassination Law" and Minnesota's Anti-Death Penalty Movement, 1849–1911*, 22 WM. MITCHELL L. REV. 577, 666–77, 701–03, 707 (1996).

183. Omar Malone, *Capital Punishment Statutes and the Administration of Criminal Justice: (Un)Equal Protection Under the Law!*, 15 T. MARSHALL L. REV. 87, 92 (1990) ("At least since the revolution, American jurors, have with some regularity, discarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.").

184. Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 289 n.15 (1991).

185. David McCord, *What's Messing with Texas Death Sentences?*, 43 TEX. TECH L. REV. 601, 601 (2011) ("During the peak five-year period for Texas death sentences—1992–1996—an average of 42 per year were pronounced; by contrast, in the most recent five-year period—2005–2009—an average of only 14 death sentences per year were handed down. The drop from 42 to 14 per year represents a 70% decline.").

purposes."[186]

The myriad ways in which executions have been carried out since the founding era indicate that Americans have never been all that comfortable with what happens at executions.[187] Hangings in the public square at midday gradually gave way to non-public, nighttime executions behind thick prison walls.[188] Indeed, more than eighty percent of American executions once took place between the hours of 11:00 p.m. and 7:30 a.m.,[189] with one minute after midnight becoming—for a period—one of the most popular times for executions.[190] State laws restricting the presence of television cameras and limiting the attendance of reporters at executions also suggests a deep sense of shame about executions.[191] Even methods of execution—the way we choose to kill the condemned—have morphed from gibbeting and drawing and quartering, to hangings and firing squads, to electrocutions and gas chambers, to what we have today: more clinical lethal injection protocols.[192]

When one examines the pronouncements of U.S. Supreme Court Justices—especially either nearing or after retirement—it is striking how blunt many are about the lack of necessity for, and the intractable problems associated with, capital punishment. Dissenting in 1994 from the denial of certiorari in *Callins v. Collins*,[193] Justice Blackmun famously wrote: "From this day forward, I no longer shall tinker with the machinery of death."[194] Citing the arbitrariness and unfairness of death sentences as well as the Court's failure to adhere to the commands of the U.S. Constitution, Justice Blackmun candidly concluded: "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."[195] Blackmun issued that opinion on February 22, 1994,[196] just months before he stepped down from the nation's highest court.[197]

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186. RICHARD C. DIETER, DEATH PENALTY INFO. CTR., A CRISIS OF CONFIDENCE: AMERICANS' DOUBTS ABOUT THE DEATH PENALTY 1 (2007).

187. DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 271 (2010) ("A civilized aesthetic is often invoked in cases concerned with execution methods and procedures—since executions are dangerously prone to generate the sights, sounds, and smells of physical violence and gruesome images of bodily distortion and disfigurement, all of which are disturbing to refined sensibilities.").

188. *See generally* BESSLER, DEATH IN THE DARK, *supra* note 181, at 23–97.

189. *Id.* at 6, 213–20.

190. *Id.* at 5.

191. *See generally id.* at 40–129, 163–205.

192. John P. Rutledge, *The Definitive Inhumanity of Capital Punishment*, 20 WHITTIER L. REV. 283, 284 (1998).

193. 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari).

194. *Id.* at 1145.

195. *Id.*

196. *Id.* at 1143.

197. *See* Retirement of Justice Blackmun, 512 U.S. I, VII (June 30, 1994). Chief Justice William Rehnquist noted that it was Justice Blackmun's last session. *Id.*

Other Supreme Court Justices, both current and retired, have also been circumspect. At a 2001 speech, Justice Ruth Bader Ginsburg—who expressed support for a moratorium on executions in Maryland—commented, "I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial."[198] After Justice Lewis F. Powell, Jr. retired, his biographer asked him whether, given the chance, he would change any of his votes. "Yes," Justice Powell replied, "*McCleskey v. Kemp*."[199] Powell had authored that five-to-four decision, providing the deciding vote that sealed Warren McCleskey's fate.[200] And Justice Sandra Day O'Connor, now retired, has also been critical of the way in which capital punishment laws are administered. At a speech in 2001 to the Minnesota Women Lawyers, O'Connor noted: "Serious questions are being raised about whether the death penalty is being fairly administered in this country."[201] O'Connor also emphasized that "problems" in the death penalty's administration had "become more apparent," noting that "[p]erhaps most alarming among these is the fact that if statistics are any indication, the system may well be allowing some innocent defendants to be executed."[202]

Justice John Paul Stevens is the most recent Justice to express his disdain for executions. In *Five Chiefs*, a book published shortly after his retirement from the bench, Justice Stevens wrote that the Court's judgment in *Baze* "had a critical impact on my views about the constitutionality of capital punishment."[203] Chief Justice Roberts's draft opinion, Stevens wrote, "convinced" him that there was no longer a persuasive justification for death sentences.[204] Between 1976 and 2008, Stevens noted, "the increasing use of life sentences without the possibility of parole" had changed the nature of the debate and "eliminated" the justifications for the death penalty.[205] The Court's 1976 decisions upholding capital punishment laws, Stevens wrote, were predicated on the notion "the states had narrowed the category of death-eligible offenses and would enforce procedures that would

198. Kenneth Williams, *Does* Strickland *Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1459 n.7 (2009); *see also* James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1673 n.282 (2006).

199. Adam Liptak, A *New Look at Race When Death Is Sought*, N.Y. TIMES, Apr. 29, 2008, at A10, http://www.nytimes.com/2008/04/29/us/29bar.html.

200. Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, http://www.nytimes.com/1991/09/26/us/georgia-inmate-is-executed-after-chaotic-legal-move.html.

201. Williams, *supra* note 198, at 1459 n.7.

202. Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 391 (2009).

203. JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 214 (2011).

204. *Id.* at 218. As Justice Stevens wrote: "John Roberts's opinion in *Baze*, to my surprise, convinced me that the Court had already rejected the premise that the death penalty serves a meaningful retributive purpose. His review of our earlier cases effectively demonstrated that the Eighth Amendment has been construed to prohibit needless suffering and significant risks of harm to the defendant." *Id.*

205. *Id.* at 217.

minimize the risk of error and the risk that the race of the defendant or the race of the victim would play a role in the sentencing decision."[206] But Justice Stevens had come to personally "regret" his vote in 1976 to uphold the constitutionality of the Texas law that had authorized so many death sentences,[207] with Stevens emphasizing that "the finality of the death penalty always includes the risk that the state may put an innocent person to death."[208]

The Supreme Court has upheld life sentences in multiple cases, with life-without-parole ("LWOP") sentences emerging as a viable alternative to capital punishment. In *Harmelin v. Michigan*,[209] the Court upheld an offender's LWOP sentence for possessing more than 650 grams of cocaine.[210] In *Ewing v. California*[211] and a companion case, *Lockyer v. Andrade*,[212] the Supreme Court also upheld sentences imposed under California's "three strikes law" in the face of Eighth Amendment challenges to it.[213] In *Ewing*, the Court upheld a twenty-five-year-to-life sentence under California's three strikes law after the offender stole three golf clubs worth $399 each from a pro shop.[214] And in *Lockyer*, handed down the same day as *Ewing*, the Court affirmed an offender's twenty-five-year-to-life sentence under California's three strikes law for stealing videotapes from a K-Mart store.[215] Although the Court has occasionally struck down LWOP sentences,[216] such sentences have become increasingly common[217] in America's criminal justice

206. *Id.* at 216.

207. *Id.* at 215–16.

208. *Id.* at 217. As Justice Stevens noted: "In the last four decades, more than one hundred death-row inmates have been exonerated, a number of them on the basis of DNA evidence." *Id.*

209. 501 U.S. 957 (1991).

210. *Id.* at 995 (reasoning that "a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is 'mandatory'").

211. 538 U.S. 11 (2003).

212. 538 U.S. 63 (2003).

213. *Ewing*, 538 U.S. at 28–31; *Lockyer*, 538 U.S. at 66–77.

214. *Ewing*, 538 U.S. at 28–31; *id.* at 30–31 ("We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments."); *id.* at 32 (Scalia, J., concurring) ("Because I agree that petitioner's sentence does not violate the Eighth Amendment's prohibition against cruel and unusual punishments, I concur in the judgment."); *id.* at 32 (Thomas, J., concurring) ("Because the plurality concludes that petitioner's sentence does not violate the Eighth Amendment's prohibition on cruel and unusual punishments, I concur in the judgment.").

215. *Lockyer*, 538 U.S. at 66–77.

216. Miller v. Alabama, 132 S. Ct. 2455 (2012) (striking down mandatory life-without-parole sentences for juvenile homicide offenders); Graham v. Florida, 130 S. Ct. 2011 (2010) (holding that the Eighth Amendment prohibits the imposition of a life-without-parole sentence on a juvenile offender who did not commit homicide); Solem v. Helm, 463 U.S. 277, 279 (1983) (reversing a life sentence for a recidivist convicted of a seventh non-violent felony, writing a worthless $100 check on a non-existent account).

217. CONNIE DE LA VEGA ET AL., CENTER FOR LAW & GLOBAL JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 22 (2012) ("Forty-nine of [fifty] U.S. states, the United States, and the District of Columbia allow life without parole sentences. Six states and the United States *require* all life sentences to be without the possibility of parole."); *id.* ("LWOP is mandatory upon conviction for at least one specified offense in

system[218] and are frequently authorized by legislatures and permitted by the courts.[219] Indeed, it is well documented that support for capital punishment falls precipitously when LWOP is offered as a sentencing alternative.[220]

CONCLUSION

When the mounting evidence regarding the death penalty's actual operation is reviewed in total, it seems clear that the U.S. Supreme Court will soon have to address the constitutionality of executions once more. It did so in 1972[221] and in 1976[222] though when it will do so again is up to the Court itself to decide. The Justices, exercising their judicial independence, must ultimately interpret the Eighth Amendment's text, which unequivocally prohibits "cruel and unusual punishments," making no carve-out or exception for the punishment of death. If the "cruel and unusual punishments" language is fairly considered in light of the factual evidence surrounding the death penalty's operation, the Court should find executions to be unconstitutional.[223]

But what about Justice Antonin Scalia's "originalist" approach, which focuses on trying to divine what was or was not deemed acceptable in the eighteenth-century, in the era of America's founders? Although the words "capital," "life" and "limb" certainly appear in the U.S. Constitution, as Justice Scalia is fond of pointing out,[224] those provisions—in the Fifth and Fourteenth Amendments[225]—were drafted as constitutional *protections* for individuals when mandatory death sentences were still the legal norm.[226] The Fifth and Fourteenth Amendments, which must be read with the Eighth Amendment's absolute prohibition against "cruel and unusual punishments," did not etch in stone an archaic penal code for all

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27 states. LWOP is mandatory in many states for a murder conviction, and in at least eight, it is mandatory upon conviction under a recidivism statute.").

218. DE LA VEGA ET AL., *supra* note 217, at 8 ("The number of prisoners serving LWOP sentences is more than 41,000 in the United States. In contrast, there are 59 serving such sentences in Australia, 41 in England, and 37 in the Netherlands. The size of the U.S.'s LWOP population dwarfs other countries' on a per capita basis as well; it is 51 times Australia's, 173 times England's, and 59 times the Netherlands'.") (citations omitted). Life sentences themselves have grown exponentially in the U.S. over the last few decades. *Id.* at 17 ("The number of prisoners serving life sentences quadrupled between 1984 and 2008, from 34,000 to more than 140,000. The number of prisoners serving life sentences in federal prisons grew tenfold from 410 to 4,200 during the same time period.").

219. *See* Hong v. Sec'y Dep't of Corr., No. 11-13728, 2012 WL 2141821, at *3 (11th Cir. June 14, 2012) ("A sentence of life without parole has been affirmed by different courts, including the Supreme Court.").

220. Ramdass v. Angelone, 530 U.S. 156, 197 (2000) (Stevens, J., dissenting) ("General public support for the death penalty also plummets when the survey subjects are given the alternative of life without parole."); O'Dell v. Netherland, 521 U.S. 151, 172 (1997) (Stevens, J., dissenting) ("[T]he decline in the number of death sentences has been attributed to the fact that juries in Virginia must now be informed of the life-without-parole alternative.").

221. *See* Furman v. Georgia, 408 U.S. 238 (1972).

222. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

223. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 317–38.

224. *Id.* at 315–16.

225. *Id.*

226. *Id.* at 316.

time. For anyone who remains unconvinced, it should not go unnoticed that although the Bill of Rights uses the word "limb," U.S. courts no longer allow a person's "limb" to be cut off.[227] If a "limb" can no longer be taken from an offender, why, one might reasonably ask, does the Supreme Court still construe the Constitution to allow a "life" to be taken?

Although maximum-security prisons now exist to house violent offenders, American executions still continue to be carried out sporadically. When they occur, they are the result of an arbitrary and racially discriminatory system,[228] all of which runs counter to the basic principles of the Eighth and Fourteenth Amendments.[229] Indeed, despite all the efforts by legislators and the courts since *Furman*, the death penalty remains as arbitrary and as problematic as ever.[230] To borrow Justice Potter Stewart's words from his opinion in *Furman*, lightning continues to strike a "capriciously selected random handful" of those sentenced to die.[231] If Eighth Amendment case law, as a whole, is ever to be reconciled, capital punishment must be declared unconstitutional. Corporal punishments such as the pillory and the whipping post have already been rejected in our penal system,[232] and the same humanitarian impulse that leads judges to prohibit such harsh corporal punishments should lead them to declare executions unlawful.[233] Executions are no longer necessary as LWOP sentences are now readily available to protect the public from heinous offenders.

For the time being, the gears of America's badly broken machinery of death grind on. The facts, though, unmistakably show that the death penalty is "cruel and

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227. *Id.* at 343–44. As noted earlier, even Justice Scalia—calling himself a "faint-hearted originalist"—has indicated that he himself would no longer tolerate a harsh corporal punishment such as flogging. *Id.* at 327 (citation omitted).

228. The arbitrariness and racial bias in America's death penalty system is in direct contravention of both the Eighth Amendment and the Fourteenth Amendment's due process and equal protection guarantees. *See* U.S. CONST. amends. VIII, XIV; *see also* Jones v. United States, 527 U.S. 373, 381 (1999) ("[W]e have said that the Eighth Amendment requires that a sentence of death not be imposed arbitrarily."). In a recent book review, newly retired Justice John Paul Stevens expressed his own concerns about arbitrariness this way: "Arbitrariness in the imposition of the death penalty is exactly the type of thing the Constitution prohibits, as Justice Lewis Powell, Justice Potter Stewart, and I explained in our joint opinion in *Gregg v. Georgia* (1976). We wrote that capital sentencing procedures must be constructed to avoid the random or capricious imposition of the penalty, akin to the risk of being struck by lightning." John Paul Stevens, *A Struggle with the Police & the Law*, N.Y. REV. OF BOOKS (Apr. 5, 2012), http://www.nybooks.com/articles/archives/2012/apr/05/struggle-police-law/. "Today," Stevens wrote, "one of the sources of such arbitrariness is the decision of state prosecutors—which is not subject to review—to seek a sentence of death." *Id.*

229. The Fourteenth Amendment, ratified in 1868, explicitly requires "equal protection of the laws." U.S. CONST. amend. XIV.

230. Lindsey S. Vann, *History Repeats Itself: The Post-*Furman *Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1288 (2011) ("History has repeated itself. The capital punishment system in America is as arbitrary as it was leading up to *Furman*.").

231. Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

232. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 258.

233. *Id.* at 344.

unusual" in both a legal and factual sense.[234] Not only is the system riddled with error[235] and discrimination,[236] but executions fly in the face of what the Supreme Court itself says the Eighth Amendment is designed to do: protect prisoners.[237] The Supreme Court has long emphasized that the touchstone of the Eighth Amendment is "human dignity,"[238] yet death sentences and executions—which deprive inmates of their lives—run directly counter to that principle.[239] Indeed, death sentences cause far more psychological and emotional trauma than other acts that have been found to be Eighth Amendment violations.[240] The arbitrariness of

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234. *See, e.g.*, J. Trout Lowen, *Is the Death Penalty Unconstitutional?*, MINN. 28–31 (Winter 2012), *available at* http://www.minnesotaalumni.org/s/1118/social.aspx?sid=1118&gid=1&pgid=3387&cid=5499&ecid=5499&crid=0&calpgid=3357&calcid=5509 (containing Q&A with the author in the University of Minnesota alumni magazine as to the unconstitutionality of executions); Rosalyn Park & Robin Phillips, *The Death Penalty: Cruel? Unusual?*, THE HENNEPIN LAWYER (Mar. 2012), *available at* http://hennepin.membershipsoftware.org/article_content.asp?edition=1&section=147&article=1606 (detailing problems with America's death penalty and putting them into the context of international law); BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 334, 338 (discussing the concept of human dignity).

235. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995 (2000) (finding an overall error rate of sixty-eight percent in capital cases).

236. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1738 (1998) ("[T]he problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions."); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980–2007*, 89 N.C. L. REV. 2119, 2145 (2011) ("Overall, for homicides in North Carolina from 1980 to 2007, the odds of a death sentence for those who are suspected of killing Whites are approximately three times higher than the odds of a death sentence for those suspected of killing Blacks.").

237. BESSLER, CRUEL AND UNUSUAL, *supra* note 28, at 219–21.

238. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."). *Compare* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("While the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."), *with* Gregg v. Georgia, 428 U.S. 153, 182 (1976) ("[T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment.").

239. *See* Glass v. Louisiana, 471 U.S. 1080, 1080 (1985) (Brennan, J., dissenting from denial of cert.) ("I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . . . One of the reasons I adhere to this view is my belief that the 'physical and mental suffering' inherent in *any* method of execution is so 'uniquely degrading to human dignity' that, when combined with the arbitrariness by which capital punishment is imposed, the trend of enlightened opinion, and the availability of less severe penological alternatives, the death penalty is always unconstitutional."); *see also* Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331, 340–41 (2012) ("In South Africa, the Constitutional Court utilized human dignity to hold the death penalty unconstitutional."); Brian Daniel Anderson, Comment, Roper v. Simmons: *How the Supreme Court of the United States Has Established the Framework for Judicial Abolition of the Death Penalty in the United States*, 37 OHIO N.U. L. REV. 221, 240–41 (2011) ("As recently as February 2008 a U.N. General Assembly Resolution declared that the use of the death penalty 'undermines human dignity' and called on all states for a moratorium on the use of the death penalty.").

240. *See* Babcock v. White, 102 F.3d 267, 273 (7th Cir. 1996) ("[T]he Constitution does not countenance psychological torture merely because it fails to inflict physical injury."); Shakka v. Smith, 71 F.3d 162, 166 (4th

executions—and the documented racial prejudice associated with them—only compounds the existing incongruity in the Court's Eighth Amendment law.

Death sentences and executions have declined in number over the years[241] and are now restricted largely to a few states and are mostly concentrated in just a few counties.[242] While executions in the founding era used to be the mandatory—or *usual*—punishment for certain crimes, executions have become extremely *unusual* as LWOP statutes have risen in popularity.[243] In America today, even as legislative efforts to abolish the death penalty in places such as Kansas, Maryland, and Ohio continue apace,[244] LWOP sentences have far eclipsed death sentences in terms of their usage for punishing first-degree murderers.[245] Thus, while death sentences and executions are now *unusual*, LWOP sentences have become the public's preferred—or *usual*—means to punish first-degree murderers. The only way, in fact, in which the country's Eighth Amendment case law can ever truly become *principled* and *internally consistent* is by a declaration that the death penalty is unconstitutional. Until that day arrives, the Supreme Court—in deciding individual death penalty cases—will just be tinkering here and there with the state's ultimate sanction.

Cir. 1995) (noting that "significant physical or emotional injury" can constitute an Eighth Amendment violation); Hobbs v. Lockhart, 46 F.3d 864, 866, 869 (8th Cir. 1995) (holding that an inmate's allegations of severe emotional distress, nightmares, anxiety and constant fear for his safety stated a cognizable Eighth Amendment claim); Thomas v. Farley, 31 F.3d 557, 559 (7th Cir. 1994) ("Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases . . . to be actionable as cruel and unusual punishment."); Scher v. Engelke, 943 F.2d 921, 924 (8th Cir. 1991) (holding that "evidence of fear, mental anguish, and misery" can suffice as an Eighth Amendment violation); White v. Napoleon, 897 F.2d 103, 111 (3d Cir. 1990) ("We are not prepared to hold that inflicting mental anxiety alone cannot constitute cruel and unusual punishment."); Wilson v. Silcox, 151 F. Supp. 2d 1345, 1353 (N.D. Fla. 2001) (rejecting dismissal of inmate's claim on summary judgment and noting that "some cases have recognized that verbal threats to kill an inmate do present an Eighth Amendment claim").

241. Death sentences have fallen from more than 300 per year in 1995 and 1996 to less than 80 in 2011. Executions, which peaked at 98 in 1999, have not exceeded 60 per year since 2003. FACTS ABOUT THE DEATH PENALTY, *supra* note 64, at 1, 3.

242. Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 862 (2007) ("Most death penalty cases are prosecuted at the county level, and there are great disparities between the counties.").

243. Life-without-parole sentences hardly existed in the 1980s, but grew in popularity in the 1990s. Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1280 n.136 (2011); *see also* Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1839 (2006) ("Forty-eight states now have some form of life imprisonment without parole, with a great many of the statutes enacted over the last two decades."). Today, every death penalty state has a statute on the books that allows for the imposition of a life-without-parole sentence. Vann, *supra* note 230, at 1287 n.228.

244. James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 336–37 (2011).

245. *See* LAFAVE ET AL., *supra* note 47, § 26.1(c) n.39 ("In 2008, more than 140,000 of those in prisons were serving life sentences and more than 41,000 of those will never be eligible for parole, up from 33,600 five years earlier.") (citing Ashley Nellis, *Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27 (2010)). Juries, in fact, are less likely to impose the death penalty when life-without-parole is offered as an alternative sentencing option. Baze v. Rees, 553 U.S. 35, 79 (2008) (Stevens, J., concurring) (citing studies, and noting that "the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence").